

**STATE OF VERMONT
BENNINGTON COUNTY, SS.**

STATE OF VERMONT)	VERMONT SUPERIOR COURT
)	BENNINGTON UNIT
vs.)	CRIMINAL DIVISION
)	
CHRISTIAN JAMES,)	DOCKET NO. 981-10-17
Defendant.)	

MOTION TO RECONSIDER SENTENCE

NOW COMES Christian James, Defendant, by and through his counsel, Chris J. Montgomery, Esq., pursuant to 13 V.S.A. Se. 7042(a) and V.R.Cr.P. Rule 35, requests this Court reconsider Defendant's sentence. In support of said Motion, Defendant states as follows:

STATEMENT OF THE CASE

A contested sentencing hearing was held on January 17, 2019 for the charge of DUI with death resulting. Defendant submitted, on his behalf, multiple statements from friends and family attesting to his good character, his own statement included in the PSI report, his lack of criminal record and a Sentencing Memorandum. At hearing, the State presented large photographs of the victim, as well as oral statements by family members attesting to the grief and anger over their loss. Defendant was subsequently sentenced to four years to eight years to serve. Among the factors considered by the Court in its decision were the following:

1. Defendant's BAC level at the time of the crash was .39;
2. General deterrence to the public was a major factor in sentencing;
3. The sentence was weighed against a sentence at the low end for some one with a low test, or someone who gets in a car with someone they know is intoxicated.

(Partial Sentencing Transcript pp. 24 to 28)

STATEMENT OF LAW

A Court has wide discretion to consider all factors it believes are relevant in reconsideration of a sentence on V.R.Cr.P 35, *State v. Dean*, 148 Vt. 510 (1987). In considering alteration or reduction of a sentence, the Court should consider those factors present at the time the sentence was originally imposed. *State v. Richardson*, 161 Vt. 613 (1994). The purpose of reconsideration of a sentence is to permit the trial judge to reconsider its sentencing decision, absent the heat or passions of trial or sentencing pressures and in calm reflection, and to determine the sentence is correct, fair and serves the ends of justice. *State v. LaPine*, 148 Vt 14 (1987); *State v. Allen*, 145 Vt. 393 (1985); *State v. Therrien*, 140 Vt. 625 (1982).

In considering Defendant's BAC level at the time of the crash, the Court incorrectly believed he had an alcohol level of .390. (Partial Sentencing transcript pg. 26). The Court placed substantial weight on Defendant's BAC finding it "extraordinarily high" and,

"for all judgment and all sense and all ability to control his actions on – his motor skills by being able to operate a motor vehicle are completely gone as well as control his judgment by behind – the fact that he even got behind the wheel. And that deserves punishment clearly"

(Partial Sentencing Transcript pg. 26)

At the close of the determination of the appropriate sentence, the Court again alluded to the high BAC result stating, "I mean, anyone who has that type of test and they're – it's just a matter of time between – before either their going to hurt themselves or hurt someone else."

(Partial Sentencing Transcript pg. 27)

Defendant's actual BAC content was .239. Though well above the legal limit, it is considerably less than the .39 cited by the Court.

The Court also considered, as an aggravating factor, the state of mind of the decedent in the seconds prior to the accident. In weighing this factor, the Court did not consider that the decedent's BAC at the time of the accident was .183, more than twice the legal limit. The Court weighed against Defendant the "pre-impact fear" suffered by the decedent, speculating that the decedent would have noticed the oncoming car in his lane and braked to stop. (Partial Sentencing Transcript pg. 26)

The evidence is far from clear what decedent was doing prior to the collision. His speed limit was based on the crash investigator's estimation, based upon mathematical calculations, concerning the speed and direction of the vehicles pre and post impact. However, the crash investigator was only able to obtain data from Defendant's computer recorder located in his airbag module. Thus, he could determine Defendant's speed, steering, braking and direction within five seconds of impact. The same could not be provided for decedent's vehicle as it did not have an airbag recorder that could be downloaded. As a result, it is unknown as to his vehicle's actions in the seconds prior to the crash. Considering the decedent's own BAC level, it is no less possible that he may have just swerved back into his lane, been stopped or otherwise operating in a manner below that of an unimpaired driver.

Another factor the Court weighed against a lesser minimum sentence was the fact that decedent was not in the same place as someone who chose to get in a car with someone they knew to be intoxicated. In considering this factor, the Court again failed to consider that decedent had himself chosen to get behind the wheel of a car when he had a BAC of .183. This does not justify or in any sense diminish the tragic loss of life but should have been considered when determining the severity of Defendant's punishment.

The sentencing hearing was highly charged and emotional. The State presented photographs and testimony of family members clearly distraught over the loss of a loved one and harboring great anger toward Defendant. Such sentencing hearings carry with them the risk of a sentence unduly influenced by the heat of the moment and passions of those present. It is not unusual for a sentence in a case such as this, oriented to the testimony and presentation of the State's witnesses, to be influenced by the emotions of the moment.

While the Court in its decision recognized a need for general deterrence, it did not adequately balance such need with the specific need for deterrence and rehabilitation of Defendant. 13 V.S.A §7030 of Vermont Statutes specifically provides that in any sentencing determination:

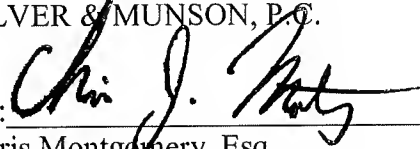
"...the court shall consider the nature and circumstances of the crime, the history and character of the defendant, the need for treatment, and the risk to self, others, and the community at large presented by the defendant."

Here, as the Court noted, Defendant had no prior history of criminal convictions and that his character, as supported by his many letters and the Pre-sentence Investigation Report, was not in question. Further, Defendant had lived in the community for 15 months without a violation of his conditions, with daily evidence of sobriety by his police check-in condition, continuing counseling and gainful employment. The risk of supervision in the community would be extremely low, while the need for treatment would be the priority, after a reasonable period of incarceration. The sentence imposed by the Court does not reflect these factors as it fails to consider Defendant's eligibility for probation, ability to live in the community at low risk to others, and the need for any treatment. Under the imposed sentence, Defendant would not be eligible for any programming for at least three years.

When weighing all the evidence before the Court, as corrected above, and with calm reflection and outside the heat and passion of the sentencing hearing, a split sentence or sentence to serve with a lower minimum is appropriate in that it more fairly balances the character, risk and needs of the Defendant with the serious nature of the crime. For these reasons, Defendant requests this Court reconsider the sentence imposed and impose a sentence of 2 to 8 years to serve or a split sentence of 4 to 8 years, with 2 years to serve.

Dated: 3/7/2019

BARR, STERNBERG, MOSS,
SILVER & MUNSON, P.C.

By: 
Chris Montgomery, Esq.
for Defendant, Christian James

cc: Alex Burke, Esq.

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IN THE VERMONT SUPERIOR COURT
BENNINGTON COUNTY CRIMINAL DIVISION

STATE OF VERMONT,) Case No. 981-10-17 Bncr
Plaintiff,)
) Bennington, Vermont
-against-)
) January 17, 2019
CHRISTIAN JAMES,) 3:08 PM
Defendant.)
_____)

TRANSCRIPT OF CHANGE OF PLEA

BEFORE THE HONORABLE WILLIAM D. COHEN,
SUPERIOR COURT JUDGE

APPEARANCES:

ALEXANDER BURKE, ESQ.
Attorney for the State

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Attorney for the Defendant

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I N D E X

CLOSING ARGUMENTS:

For the State

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For the Defendant

10

SENTENCING:

Defendant sentenced to four years at
the low end, eight years at the high
end.

PAGE

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1 (Proceedings convened at 3:08 PM)

2 STATE'S CLOSING ARGUMENT

3 MR. ALEXANDER BURKE: Your Honor, these type of
4 cases, DUI fatal cases, are some of the hardest cases to
5 sentence in this court. And --

6 THE COURT: Mr. Burke, every case is a hard case to
7 sentence.

8 MR. BURKE: It is. And this is no exception. The
9 defendant clearly did not intend to kill Jason Baumes. But he
10 did engage in a series of actions that resulted in Jason's
11 death. Our Supreme Court has identified four generally
12 accepted goals of sentencing being punishment, prevention,
13 rehabilitation, deterrence. And it also identified several
14 others being restraint, education, and retribution.

15 THE COURT: Without specific priority.

16 MR. BURKE: With no specific priority, Your Honor.
17 And the Supreme Court has indicated one goal can outweigh
18 another goal and some goals can be disregarded in a particular
19 set of circumstances.

20 In this case, the defendant chose to engage in
21 consuming alcohol, and when confronted by his friend whether
22 he would be driving home, he indicated he would be walking,
23 and then chose to get behind the wheel. The Defendant does
24 have no prior criminal record, but he does have a prior
25 history with alcohol and specifically alcohol abuse.

1 In the PSI, it does indicate that he identified
2 having problems with alcohol while he was in college and that
3 his priest was concerned with his depression, that he was
4 using alcohol to self-medicate. Because of that he withdrew
5 from college to address his drinking and went to rehab in
6 South Florida for a ninety-day stay. Apparently, successfully
7 completed that and maintained sobriety for several years. And
8 then he chose to start consuming alcohol again. Those are
9 some aggravating factors for the State.

10 Mitigating factors are the fact that the defendant
11 does have no prior criminal record and he does appear to be
12 remorseful for his actions. I cannot emphasize enough the
13 impact this has had on Jason's family and I'm not going to go
14 over again what they said because the Court said it better
15 than I could ever say. But in this type of case there must be
16 significant punishment for the death of somebody, the death of
17 a son and a brother, and the punishment must be significant.

18 We cannot weigh the scales of one life versus
19 another. But in this case we have to. On one side we have
20 Jason who is no longer with us. On the other side we have Mr.
21 James who caused his death, young man, limited record, no
22 record, but made a series of bad choices, conscious choices.
23 There must be a punishment for that effect. There must be a
24 significant punishment for the loss of Jason.

25 A sentence of five to ten years does contain that

1 punishment. It also encompasses the goal of prevention. It
2 keeps him out of the community for five years. As for the
3 goal of rehabilitation, in the State's view, that should not
4 be high on the Court's priority at this point. Mr. James had
5 his opportunity to rehabilitate himself when he went to rehab
6 and maintain his sobriety. He chose not to.

7 The family spoke significantly about the need to send
8 a message to the community. They didn't say specifically
9 deterrence; that is what they are referencing.

10 THE COURT: General deterrence.

11 MR. BURKE: General deterrence. The message that if
12 you drive drunk and kill somebody, you go to jail for a long
13 period of time. That is an appropriate response in this type
14 of situation. And a sentence of eighteen months is not a
15 significant deterrence. I would not call it a slap on the
16 wrist, but it is not significant and there needs to be a
17 significant deterrence to hopefully prevent another tragedy
18 like this.

19 There's no right answer to what the appropriate
20 sentence should be in this case.

21 THE COURT: So the legislature has enacted a
22 mandatory minimum of one year --

23 MR. BURKE: Right.

24 THE COURT: -- with a maximum of fifteen years, which
25 is a very significant range in how to appropriately sentence

1 someone without an enhancement, the enhancement being the
2 fatality.

3 MR. BURKE: Correct.

4 THE COURT: But not an enhancement from a prior -- so
5 that's -- we are looking at a wide range of options, one year
6 on the low, fifteen years on the high. It does not allow the
7 specific guide as to what factors would go into an appropriate
8 sentence structure that allows a trial judge to make a
9 reasonable and appropriate decision based on a multitude of
10 factors.

11 MR. BURKE: Yes, Your Honor. And in this case, the
12 factors mitigating against a lesser sentence is the level of
13 alcohol in his system. He had a BAC of .239. He was asked
14 whether he was walking home and he said yes, and then chose to
15 drive. He had his options not to get behind the wheel and he
16 chose to do so. He knew he had a problem with alcohol in the
17 past and then chose to start drinking again. All those
18 actions led to the death of Jason Baumes. If this was a case
19 where the BAC was .08, slip of the mindset, and a -- no other
20 record, no issue of alcohol abuse, that could be one where the
21 legislature intended the lesser punishment.

22 But in this case, he --

23 THE COURT: But why though? There's still a death.

24 MR. BURKE: It is still a death, and the legislature
25 has recognized that with the mandatory minimum of one year.

1 And we can't weigh one death with another death. I'm not
2 saying we do.

3 THE COURT: We can't weigh one case against another
4 case. Every case is different.

5 MR. BURKE: Correct.

6 THE COURT: There's no -- there's no similarity
7 between any cases involving a DUI with a DUI fatality.

8 MR. BURKE: I would agree. And --

9 THE COURT: Obviously somebody with multiple offenses
10 would be dealt with on a much higher end.

11 MR. BURKE: Correct.

12 THE COURT: But not under this statute. This statute
13 is for first offenders, one to fifteen.

14 MR. BURKE: Right. The legislature has not enhanced
15 DUI fatal second offense or DUI fatal third offense. It's
16 simply DUI fatal and has a range of one to fifteen.

17 Given his -- what the data showed on September 24th,
18 his speed he was going at, the fact that he went into the
19 incoming traffic and did not brake, are all aggravating
20 factors that deserve a higher response, both for the
21 punishment as well as the prevention.

22 THE COURT: Is the pre-impact fear, which is obvious
23 from the facts of the case, that he was aware of the
24 circumstances involving the car coming in his lane, should
25 that be factored in?

1 MR. BURKE: I think everything from that night should
2 be factored in, Your Honor, including Mr. Baumes. And we will
3 never know what he was thinking, but we do have a statement
4 from his sister, Eileen, who was in a similar situation and --

5 THE COURT: No. We have the facts of the case. He
6 slowed to either stop or to -- a few miles an hour based on
7 the vehicle being in his lane.

8 MR. BURKE: Yes. So he knew there was an impact
9 coming and unfortunately he could not prevent it. So, yes, I
10 do believe that Court can consider that factor in its
11 sentence. Given the specific impact this has had on the
12 family and the history of the defendant, I do believe that a
13 significant sentence to serve is appropriate to reach all of
14 the goals of punishment and that five to ten is that
15 appropriate sentence.

16 THE COURT: Based heavily on the punishment and
17 general deterrence versus rehabilitation and specific
18 deterrence?

19 MR. BURKE: Correct. I -- specific deterrence may
20 play some role, but even just given the statement that the
21 defendant gave in the PSI, he will have to live with this for
22 the rest of his life. I'm sure he'll think about it for the
23 rest of his life. That does not mean that there should not be
24 a significant response from the Court.

25 THE COURT: Again, I don't think there's any case

1 that's ever similar. One of the great trial judges, Judge
2 Mahady, said every defendant is like a snowflake. They're all
3 different and every sentence structure is different because of
4 so many different variables that go into what occurs, the
5 circumstances and the like. But looking at other DUI fatalities
6 within the State of Vermont, where does this fit a sentence
7 structure that would pacify the State, fit within others?

8 MR. BURKE: I believe it is within the norm, if there
9 is such a thing. Looking at just north of us, that wasn't
10 charged as a DUI fatal, but the Sullivan case --

11 THE COURT: Four to ten years.

12 MR. BURKE: Yes.

13 THE COURT: That was a hit and run.

14 MR. BURKE: That was a hit and run. But that
15 individual had no prior record and had a very (ph.) social
16 life prior to that. In this case we have an individual who
17 has no criminal record and a very social life prior to this
18 offense. So it is within the norm, if you will.

19 THE COURT: Mr. Sullivan, according to the
20 information, never took responsibility for the --

21 MR. BURKE: He did not, but I do not know if the
22 Court took that into account in its determination of the
23 sentence. But I'm not familiar enough with the specific
24 sentencing hearing at that -- for the sentencing decision.
25 I'm not the judge to say one way or the other.

1 THE COURT: Well, it had to be re-sentenced.

2 MR. BURKE: Right. But that was an issue for -- the
3 judge declined a request to continue the hearing for the
4 expert testimony to come in, I believe.

5 THE COURT: Right. But I still think that there --
6 in the end went to trial.

7 MR. BURKE: Correct.

8 THE COURT: They did go to trial.

9 MR. BURKE: They did go to trial. But we do not
10 punish people with higher sentences by -- when they go to
11 trial.

12 THE COURT: We do not. Clearly. Thank you.
13 Mr. Montgomery?

14 DEFENDANT'S CLOSING ARGUMENT

15 MR. CHRISTOPHER MONTGOMERY: Thank you, Your Honor.

16 Just to address the last issue raised by the Court, a
17 review of sentences that have been handed down, I'm looking at
18 gross negligent operation as well as DUI, as they both carry
19 the one- to fifteen-year sentence. But the numbers seem to be
20 all over the place, which proves the Court's finding that
21 every case is different. There is no cookie-cutter type case.

22 Every situation seems to be unique, both as to the
23 defendant and as to the incident. They range from deferreds
24 to straight incarceration. The range of incarceration has
25 been from one year in docket 58-1-14 in Franklin County to

1 five, whereas the max I saw was 74-2-13 in Orleans County, six
2 years to fifteen. Now, I don't have the facts underlying any
3 of those, other than they include people with priors, people
4 who did hit and runs, people who engaged in such actions where
5 there was clearly a severe warning as to their behavior prior
6 to that incident or what was going on.

7 THE COURT: But that goes to what I was asking Mr.
8 Burke about. There's no guide to this.

9 MR. MONTGOMERY: Yeah. There really isn't.

10 THE COURT: There's no special formula that you can
11 plug in and say because of x, y, and z, the sentence should
12 be --

13 MR. MONTGOMERY: No, Your Honor. And each case must
14 be taken on its individual merits. And I would ask that
15 this -- that the Court consider the individual merits of Mr.
16 James in this case, and of course the statute which provides
17 the guidelines for sentencing and I'm referring to 13 V.S.A.
18 Section 730 (sic): the nature and circumstances of the crime,
19 the history and character of defendant, the need for
20 treatment, risk to self, others in the community at large
21 presented by the defendant, as well as the guidelines which
22 Mr. Burke has pointed out, the need for punishment, for
23 deterrence, both specific and general, for rehabilitation.

24 We know on September 23rd -- before September 23rd,
25 2017, Mr. James was working as an employee at the Equinox

1 Hotel. He'd been working there for several months, had
2 developed friendships there. He lived in Manchester Village
3 with his family who lives there part time from New Jersey.
4 His family and friends are present, as you can see, and they
5 have submitted letters that were attached to the sentencing
6 memorandum as well as attached to the PSI.

7 At --

8 THE COURT: I reviewed the letters that were --

9 MR. MONTGOMERY: They lay out -- and I point that out
10 just to lay out the background that he was raised as a person
11 who is caring, who is loving. It's not just that he has no
12 criminal record, but he's always lived a law-abiding life.
13 Mr. Burke is correct, there was a time when he was in college
14 where, through issues, he attended rehabilitation. And he
15 remained clean and sober and out of trouble for many years --
16 for years.

17 He, on September 23rd, goes to Mulligan's with
18 friends, it's karaoke night. We -- Mr. James cannot state and
19 could not state because he has no memory of the events. He
20 was, I believe, in a coma, either induced or by self because
21 of the injuries until Wednesday after the date of this
22 incident. That was at least three days. He does not -- he
23 remembers working at the Equinox and that's it. It is the
24 interviews with the people who were with him to which Mr.
25 Burke is relying upon and from which make the basis of the

1 affidavit. He goes after work to Mulligan's. He stays there
2 until about 2 a.m. About 2:15 is when this -- when the
3 collision occurs.

4 The blood alcohol level indicates, and as Mr. James
5 pointed out correctly, he had no alcohol at home and did not
6 go anywhere else before Mulligan's or -- yeah, before
7 Mulligan's and then after Mulligan's. He was served an
8 inordinate amount of alcohol. But the law requires he is
9 responsible for accepting that service. Mulligan's has to
10 answer for its own liability in serving someone so much
11 alcohol that they would reach a .239, but the law requires --

12 THE COURT: That's a similar issue. That's a civil
13 case involving dram shop liability, which I'm --

14 MR. MONTGOMERY: Exactly. The law still requires
15 he's responsible for consuming the alcohol, regardless of what
16 Mulligan's may have done wrongfully or rightfully. And he
17 accepts that.

18 The amount of alcohol, as the Court knows, and as
19 pointed out, there are so many of these DUI accidents, both
20 fatal and nonfatal because one of the first thing that happens
21 when people consume alcohol is judgement goes out the window.
22 And the impairment becomes higher with the more alcohol
23 consumed.

24 We cannot presume -- I would argue the Court not to
25 presume that Mr. James, and I know nobody's accusing him of

1 consciously and knowingly soberly getting into his car with
2 any intent of harming anybody. By everything in the PSI,
3 everything we know about Mr. James, he wouldn't hurt a flea.
4 And on this day, he got behind the wheel, he crossed the line,
5 what we know from all the data and the reconstruction of the
6 accident. It does not appear that Mr. Baumes did anything
7 wrong. We don't know why he was driving so slow or why he was
8 stuck. We can presume he may have seen the oncoming car and
9 attempted to brake, but we don't know. We know that he also
10 had a blood alcohol level, but there is nothing that indicated
11 that Mr. Baumes in any way contributed to the accident. He
12 didn't cross into Mr. James' lane. Mr. James crossed into
13 his. And Mr. James was driving at a speed somewhere between
14 68 and 70 by the black box.

15 THE COURT: It's an undisputed fact, as indicated by
16 Mr. James, that his alcohol consumption was -- caused the
17 accident and caused the fatality.

18 MR. MONTGOMERY: That's correct. We --

19 THE COURT: And that's an important component to the
20 case.

21 MR. MONTGOMERY: And impaired his ability to stay in
22 his lane and to operate his vehicle in a safe manner. No
23 doubt about that. There's no dispute there.

24 In looking at punishment, the statute -- the
25 legislature makes a range of one to fifteen, considering

1 mitigating factors and aggravating factors. The aggravating
2 factor being the high consumption of alcohol. I would not
3 argue that it was an aggravating factor that Mr. James, years
4 earlier, had a problem when he was younger and sought to
5 remedy that and took actions on that. I would consider that a
6 mitigating factor in the sense that he had done the same thing
7 following this accident, may well have done the same thing if
8 he had gotten home safely and realized he had consumed so much
9 and this was going to be a problem. In fact, his history
10 would show that. But unfortunately it didn't. It led to the
11 death of another person and whether that person being a
12 stranger or a loved one, the death is no less important or no
13 less of an impact on him. And he acknowledges that.

14 As you've noticed in his PSI, the statements to
15 the -- to Ms. Mooney, as well as the statement and the letter
16 of his parents, he carries a reminder of Mr. Baumes every day
17 to know what he cost him, what he did, and how he's
18 responsible.

19 Since the date of his arraignment, he has had to
20 check-in daily and blow to ensure he didn't drink again.
21 We've been -- since September 30th of -- approximately
22 September 30th/October of 2017, he has been sober and he's
23 proven his sobriety. He has attended counseling with James
24 Riley. He has taken a proactive look that a person taking
25 responsibility and understanding the problem lays upon that.

1 And so we not only do not have a prior criminal record but
2 since this incident we have clear evidence that he could abide
3 by conditions and is committed to his sobriety and understands
4 the gravity of what happened.

5 And so the question is, is what is the appropriate
6 punishment here? We do not, as the Court acknowledges,
7 sentence a person based upon the value of somebody else's life
8 but of the crime itself and weighing all factors. Clearly, in
9 a case like this, we're going to hear from and understand just
10 how much was lost. And Mr. James, from reading the letters
11 that were submitted, the PSI as well as the letters, and
12 listening to testimony, has a clear appreciation of what his
13 actions have cost others.

14 And now before the Court is what is to be done with
15 Mr. James. The Court knows the history, and background, and
16 life of Mr. James as I set out in my sentencing memo. The
17 need for treatment, I believe still exists. He needs to
18 continue counseling, not just to maintain sobriety, but to
19 deal with the depression and grief that comes when you know
20 that you -- someone's dead and it's your fault. Otherwise
21 there is a risk to Mr. James and the community that Mr. James
22 may choose I don't want to live anymore, I don't want to be
23 productive anymore, I don't want to live anymore, I don't have
24 anything to live for. These are the type of things in which
25 one of the messages as part of punishment is, no, you have an

1 obligation to society, you have an obligation to yourself and
2 you have an obligation to the family of that person to whom
3 you've killed to give back to that society. And you cannot
4 just run or hide from it. Mr. James is not doing that.

5 But in fashioning a sentence, Your Honor, I would ask
6 that the important thing here really is the rehabilitation and
7 retribution, what is to be demanded he give back. The benefit
8 of a split sentence, aside from having a minimum and max
9 hanging over him if he strays even by violating a condition
10 such as going back to drinking or engaging in any type of
11 reckless behavior, he's got that hanging over him. But he
12 also has an indefinite period of probation. A five-year
13 sentence means that at five years, judging he does not get in
14 trouble or anything, he would come out. And five years from
15 now, he'd just mark the time and then he'd be on parole, and
16 after ten years or an initial five years, he would be under no
17 supervision.

18 The Court, in a split, can determine when the Court
19 decides he should no longer be under supervision. A year and
20 a half is not, as Mr. Burke understands, is not a slap on the
21 wrist. Mr. James has never spent a day in jail.

22 Incarceration is the most significant form of punishment we
23 can give anybody in this state. And to a person who's never
24 known jail, it can -- eighteen months is a very significant
25 amount of jail sentence.

1 The other thing in considering this is in considering
2 the need for continuing treatment, for continuing counseling
3 or if there is to be a break, to make sure that break is not
4 so large as to undermine attempts at counseling. In the PSI,
5 Ms. Mooney points out that one thing that they would expect of
6 him is that he do the risk reduction program. And there is
7 programming inside as well as outside, but definitely inside.
8 These type of programs are generally six, nine, twelve months
9 at the most. I think actually about nine months. So that
10 he's going to have dead time where all he's going to do is
11 sit. There isn't going to be any counseling or programming.
12 The programming will be put in before he reaches his minimum,
13 but not so much so that he just sits after he's completed his
14 programming.

15 So the eighteen months factors in not -- the reason
16 we're not asking for the minimum is that we're asking for the
17 minimum plus the time necessary for the programming. So we
18 have both a year of pure, nothing but incarcerative
19 punishment, followed by six months of risk reduction
20 programming.

21 Then we have requirements that are very restrictive
22 from the conditions of probation. I mean, that's -- probation
23 itself is a punishment. It is a restriction on liberty. It
24 is a restriction on who he associates, lives, curfew. All of
25 the things that probation can impose is also a form of

1 punishment. And that punishment in a split can be indefinite.
2 It may not have an end time until the Court determines it has
3 an end time.

4 A sentence of five years means four and a half years
5 of strict dead time before he'd be eligible for any type of
6 programming. And in considering Mr. James, his background,
7 his history, what he's done before this night, and everything
8 he's done after, that is a significant amount of punishment
9 beyond what would be necessary as a deterrence. There is
10 nothing provided by the PSI, by the State, or anybody that
11 says Mr. James himself needs to be removed from society
12 because Mr. James is a constant, continuing threat to others.
13 That is an argument applied to those who are on their second,
14 third, fourth DUI, or lead a criminal life or some life that
15 shows that they have no respect for the welfare of others.
16 Well, then we have to remove you for a significant time.

17 Mr. James clearly demonstrates he understands the
18 deterrence. If there is deterrence here, it should be
19 general. And by arguing and not asking for a full
20 suspended -- by agreeing and arguing for this sentence, and
21 I'm arguing for this sentence because I believe it is the most
22 appropriate taking all things into consideration, it still
23 sends a message to the community of if you get behind the
24 wheel intoxicated and you take a person's life, you are going
25 to go to jail, period. How long will depend on that case as

1 well. How much deterrence that applies to people who drink
2 and they are not thinking? We don't know. We don't know how
3 many people don't get behind the wheel because someone -- they
4 read in the paper someone served a jail sentence from the fear
5 they might go to jail. We just don't know those facts. But
6 to the extent that deterrence should apply here, the Court
7 should consider it more as general than as personal because
8 Mr. James has demonstrated he understands what he did and what
9 he needs to do to make sure something like that never happens
10 again.

11 THE COURT: How should consequences be factored in?

12 MR. MONTGOMERY: The consequence of getting behind
13 the wheel and taking a person's life is twofold. He's going
14 to lose his freedom in a jail sentence for a year and a half.
15 That is not insignificant. Then he is going to be under a
16 period of supervision for a very long time. And he's going to
17 be at risk of so much as any deviation of serving a four- to
18 eight-year sentence. So a matter of consequence is how much
19 the Court determines that incarceration, that form of
20 punishment, should be a significant consequence based on the
21 fact that someone died here or -- I won't say significant, but
22 is four years that much of a consequence or eighteen months
23 when we're talking about incarceration itself.

24 And to acknowledge -- and I would argue to
25 acknowledge that there's a certain point in which a person's

1 jailed where that punishment has diminishing marginal returns,
2 that when a person who sits in jail for ninety days is
3 terrified; a person who sits in jail for nine months begins to
4 acclimate, but eighteen months is a long period of time for a
5 person who's never sat in jail. And that's a serious
6 consequence. It is by no means a slap on the wrist. That is
7 a removal from society. And then when he returns back to
8 society under strict, harsh conditions, they are also
9 consequences as he knows and the Court has pointed out, he's
10 got a felony on his record, he's got the type of felony that
11 will deprive him of many potential opportunities in his life
12 that he would've had had he not gotten behind the wheel and
13 had so much to drink.

14 And he can't argue that if only my friends had
15 stopped me. If only the bar hadn't served me. Consequences
16 must all lie upon him, but I can't think of any -- how many
17 days in jail you could add that would be greater than the
18 consequence of living the rest of his life knowing he took
19 somebody else's. I mean, I'm -- it's hard to fathom a
20 consequence greater than that guilt. And it's -- and the
21 eighteen months I'm arguing is based solely upon the person
22 and the mitigating circumstances that stands here before you,
23 and that's why I'm asking for that sentence.

24 With regard to the conditions of probation, Mr. James
25 would have no objection. The ones I would raise, Your Honor,

1 and if I could -- just bear with me. There's one that he's
2 not to associate with people who may be reasonably suspected
3 of consuming alcohol or drugs without a prescription. Ah,
4 here we go. Condition 12, your probation officer may prohibit
5 you from residing or associating with individuals reasonably
6 suspected of consuming or selling illicit regulated substance
7 abuses or alcohol.

8 I have an objection. That's over broad. That's
9 vague and difficult to enforce, particularly with the term of
10 reasonable. Is it reasonable to the probation officer or
11 reasonable to Mr. James? How would that be reasonable? I
12 would think more tailored would be that he not associate --
13 I'm not sure how you could possibly do that, but I would leave
14 that to the Court, but I believe as it's written there, it's
15 just too vague for him to understand when he's following it,
16 if he's with somebody who might have a drinking problem that
17 he might not know anything about.

18 I think the other restrictions that he's not -- I'm
19 not sure if it's in here, not to go to places where the
20 primary business is consumption of alcohol. That wouldn't --
21 if he were to allowed to return to Equinox, that's not their
22 primary business and he doesn't even work in the areas
23 involving service of alcohol. He works behind the desk.

24 Reasonable restrictions on location of your
25 residence. I'm not sure how restricting a residence would

1 apply to the crime here and that's why I would object to that,
2 is that where he lives does not seem to play any role in the
3 crime here. And again, restrictions with those whom you
4 associate is -- gives the officer the power for any reason
5 without stating specifically why he should not be able to
6 associate with anybody.

7 So aside from conditions 12, 25, and 26, Mr. James
8 has no objection to the other conditions imposed and they're
9 significant.

10 THE COURT: Mr. James? You have time to speak at
11 this time if you wish.

12 (Pause)

13 THE COURT: If you -- it'll pick it up. You don't
14 need to speak into the microphone.

15 THE DEFENDANT: Oh, okay.

16 THE COURT: Microphone.

17 THE DEFENDANT: I've turned over a thousand times in
18 my head what I'd say today. A thousand times I've grappled
19 with how to address this court, a way to explain or apologize
20 for the loss of a son, a brother, the best man and the friend,
21 a man I didn't know in life, but have since come to know by
22 way of his impact on others. This is a man who I do carry a
23 picture of every day because I find it important to look at
24 his face because I know that this person was their everything.

25 And I would do anything to bring him back. And I've

1 completely -- if they need time for me, whatever the amount of
2 time is, if that's all I can give this family, then I owe them
3 at least that much and I'm -- you know, sorry and apologies
4 are a hollow thing, but I do apologize for the impact that
5 it's had on them. That's -- I --

6 MR. MONTGOMERY: Thank you, Judge.

7 THE COURT: Thank you.

8 I'm going to take a break. Sentencing is clearly the
9 most difficult thing that we do. There's no guide. There's
10 no magic formula. There's nothing that you can say to plug in
11 and say this is the answer because there is no answer and
12 we're dealing with a tragic loss, an unfortunate tragic loss,
13 but it's my responsibility to impose an appropriate sentence
14 based on all the circumstances. The legislature has given us
15 great leeway in determining what appropriate would be under
16 these circumstances.

17 And there's some good things in Mr. James' way and
18 there are very bad things in Mr. James' way and I'm going to
19 weigh them all up and come back and give a sentence.

20 THE CLERK: All rise.

21 (Recess at 3:44 p.m., until 3:53 p.m.)

22 THE COURT: We're back on the record on the State of
23 Vermont v. Christian James who's pled guilty to one count of
24 DUI with a .08 or more with a fatality caused by his actions
25 of operating a motor vehicle on a public highway while under

1 the influence of alcohol.

2 I've been doing this job for twenty years and it
3 never gets easier. It never gets clearer. It never becomes
4 more defined as to what is appropriate, what's not appropriate
5 of how to do this. And before that I was an attorney for
6 almost twenty years doing similar types of cases, mostly in
7 the civil cases with wrongful death actions, involving trying
8 to value human life, which is something that I think is
9 difficult under any circumstances, to put a value on a human
10 life, because you never can, either on the civil side where
11 someone could have a wrongful death action or on the criminal
12 side where society has a claim against someone for doing what
13 Mr. James did that night.

14 And then Mr. James has some good things going for
15 him. He's taken responsibility for his actions. That's
16 something that I think everyone looks at as a positive. He
17 has no record. I'm not going to hold the fact that he went to
18 rehabilitation in college against him in any way in imposing a
19 sentence. He appears to be remorseful. It's very clear he
20 appears to be remorseful. He's very clear in the statements
21 that he gave in the plea and -- but you can't remove the human
22 factor in any case.

23 And we have laws -- we have laws, we have rules, we
24 have guides, we have all these different things, but in the
25 end we're talking about human beings and we're talking about

1 consequences of human interaction. And to say that the law
2 provides guide for this or law provides guide for that is in
3 my mind is a fallacy because we're dealing with people and
4 we're dealing with lives and we're dealing with tragic
5 components of life, where everyone in this room, everyone in
6 this room has felt the trauma of the unfortunate consequences
7 of Mr. James' action that night. That means his family as
8 well as the victim's family. And it's deep and it's strong
9 and it's powerful and it's going to last for a long time. And
10 how do you factor that into coming out with a necessary and
11 appropriate sentence?

12 And on the bad side it was a 0.39 (sic) test which is
13 extraordinarily high, for all judgment and all sense and all
14 ability to control his actions on a -- his motor skills by
15 being able to operate a motor vehicle are completely gone as
16 well as control his judgment by behind -- the fact that he
17 even got behind the wheel. And that deserves punishment
18 clearly.

19 And the randomness and the needlessness of the death
20 here, where an individual is driving down the road and I do
21 factor in the pre-impact fear. I think that there's very
22 clear that the pre-impact component in this case where the
23 deceased sees the car in his lane, he slows down to the point
24 where he's either not moving or going very slowly and that
25 does factor in.

1 And so we look at all the different components of
2 sentencing from specific deterrence, which I don't think is --
3 I think the specific deterrence in Mr. James' situation is the
4 fact that he's going to bear the brunt of a felony and that
5 that unto itself is going to create some deterrence for him.
6 But at some level, you need to have some general deterrence on
7 people making uninformed, ill-advised, not from any, any
8 reasonableness, getting behind the wheel of a car that causes
9 the death of another human being. And that doesn't mean
10 just -- that means just anyone. I mean, anyone who has that
11 type of test and they're -- it's just a matter of time
12 between -- before either they're going to hurt themselves or
13 hurt someone else.

14 And so you look at the cases that would cause -- what
15 you say would be at the low end, if there is a such a thing as
16 the low end on a fatality, and I'm not so sure there is,
17 somebody with a low test, somebody who gets in the car with
18 someone who they know is intoxicated, someone who does --
19 who's gone through their whole life without anything -- I'm
20 not sure how you ever do a low end on this.

21 But this case deserves appropriate punishment and
22 deserves appropriate general deterrence for people in the
23 community. And I have a responsibility to the community. I
24 have a responsibility to the State of Vermont to ensure that
25 people who put themselves in the same situation that Mr. James

1 did that night think more critically about how their actions
2 are and how their actions are perceived and the consequences
3 of their actions. This is not a case that deserves a split
4 sentence. It's not a case that deserves eighteen months in
5 prison. I'm thinking more at the top end, the high end, of
6 the case where it would be. Legislature did not divide it
7 down into saying that if it's a multiple offense that there
8 would be a sentence of ten years to fifteen years or
9 something. I'm factoring in the death of a human being. I'm
10 factoring it high as the consequences of the death as outlined
11 by everything I've read and everything I've heard.

12 So on the short end of the -- on the low end it's
13 going to be a four-year sentence to serve and on the high end,
14 eight years. And what's the State's request on reporting?

15 MR. BURKE: Immediately, Your Honor. And I believe
16 Mr. Montgomery has prepared his client for that.

17 MR. MONTGOMERY: That's correct, Your Honor. He's
18 ready to report today.

19 THE COURT: Today?

20 MR. MONTGOMERY: Yes.

21 THE COURT: All right. He'll go into custody. Thank
22 you.

23 THE CLERK: All rise.

24 (Proceedings concluded at 3:59 PM)

25

C E R T I F I C A T I O N

I, Pessy Kaufman, the court-approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



February 4, 2019

PESSY KAUFMAN

DATE

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